SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-538-DG

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2010-CA-1063-MR

RON CADLE, Individually and as the
Administrator for the Estate of Jane Cadle,
and SARAH CADLE — APPELLANTS

V. **BRIEF FOR APPELLEE ALLSTATE INSURANCE**

WILMA CORNETT and
ALLSTATE INSURANCE — APPELLEES

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the original of this brief was served via registered mail this the 7th day of October, 2014 upon the Clerk of the Supreme Court, 700 Capitol Avenue, Frankfort, KY 40601 and a true and correct copy was mailed to Joseph C. Klausing and Benjamin J. Weigel, OBRYAN, BROWN & TONER, PLLC, 1500 Starks Building, 455 South Fourth Street, Louisville, Kentucky, 40202; James B. Dilbeck, 1100 Kentucky Home Life Building, 239 S. Fifth Street, Louisville, KY 40202, Samuel Givens, Kentucky Court of Appeals, 700 Democrat Drive, Frankfort, KY 40601 and Hon. James M. Shake, Jefferson Circuit Judge, 700 West Jefferson Street, Louisville, KY 40202. It is further certified that the record on appeal was not withdrawn.

WM. CLIFTON TRAVIS

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vs.

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BRIEF FOR APPELLEE ALLSTATE INSURANCE COMPANY

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee Allstate Insurance Company states that the material facts have been stipulated and the applicable law is clear, and accordingly, Allstate does not believe that oral argument is necessary.

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COUNTERSTATEMENT OF THE CASE

Appellee Allstate Insurance Company ("Allstate") does not accept appellants' Statement of the Case as presented in their brief. In accordance with the requirements of paragraph (4)(d)(iii) of CR 76.12, Allstate submits the following matters as essential to a fair and adequate statement of the case.

This action arises from a May 8, 2005 automobile accident in which appellants (the "Cadles" or "appellants") suffered injuries. (See Court of Appeals Opinion, Exhibit 1 hereto, at 2.) The Cadles' accident was the second of two accidents which occurred on opposite sides of Interstate 64, on which there were eastbound and westbound lanes separated by a wide, grassy median. Id. The first accident involved a single car driven by Wilma Cornett, who was traveling westbound on I-64 in Shelbyville, Kentucky, when she lost control of her vehicle, went into the median, and struck the base of the eastbound bridge below the roadway. Id. In the second accident, the Cadles, who were traveling on eastbound I-64 toward Lexington, came to a complete stop in a traffic jam that had arisen after Cornett's accident. Id. The driver of a tractor trailer rear-ended the Cadles' vehicle, which resulted in Jane Cadle's death and injuries to Sarah Cadle. Id.

Contrary to appellants' Statement of the Case, there is absolutely no evidence that "[t]raffic in the eastbound lanes naturally stopped in response to Ms. Cornett's loss of control and the approaching, oncoming vehicle in the grassy median." (Appellants' Brief at 1.) In fact, there is no evidence that anyone in the eastbound lanes even saw the Cornett vehicle enter the median or come to rest in the creek bed below the interstate.

After settling with the owner of the tractor trailer, the Cadles sued Cornett, alleging her negligence was a direct and proximate result of their injuries and damages. (See Court of Appeals Opinion at 3.) Cornett moved for summary judgment, arguing her own accident was not the proximate cause of the Cadles' accident, which occurred approximately 1.34 miles away. Id. Cornett argued that if the stopped traffic constituted any kind of hazard, it was a hazard caused by the emergency personnel who first responded to her accident and that it was the tractor trailer driver who had caused the accident with the Cadles by failing to avoid colliding with the Cadles. Id.

The trial court agreed with Cornett, granting her summary judgment and holding, "it would appear that the act of the first responders in stopping traffic, and the negligence of the semi-driver constitute superseding causes." (March 23, 2010 Trial Court Order, Exhibit 2, at 3.) The trial court further held: "It is the opinion of this Court that the effect of the Cornett crash had 'spent itself,'" and the "Cornett crash was not part of any 'chain reaction.'" Id. On May 14, 2010, the trial court denied the Cadles' motion to alter, amend or vacate the March 23, 2010 order. (May 14, 2010 Trial Court Order, Exhibit 3.)

The Court of Appeals affirmed, stating the "Cadles produced evidence of only one accident—namely, their own—that occurred within the approximately 1.34 mile-long traffic jam at issue. The Cadles themselves were able to effectively stop at the tail end of that traffic jam. Equally important, while the record reveals that the driver of the tractor trailer did fail to brake in time to avoid colliding with the Cadles, there is nothing in the record explaining why he failed to brake in time, much less that any condition attributable to the traffic jam prevented him from doing so. And, the Cadles point to no evidence capable of demonstrating that the traffic on eastbound I-64 backed up quickly enough to create the

hazard of preventing any driver, in the exercise of reasonable care and prudence, from effectively stopping in time." (See Court of Appeals Opinion at 10.) The Court of Appeals concluded "we find no error in the trial court's conclusion, which it based upon [Donegan v. Denney, 457 S.W.2d 953 (Ky. App. 1970)] and the undisputed evidence of record, that the tractor trailer driver's failure to effectively stop was a superseding cause of the Cadles' injuries." Id.

ARGUMENT

I. THE "SUPERSEDING CAUSE" DOCTRINE REMAINS VIABLE FOLLOWING KENTUCKY'S ADOPTION OF COMPARATIVE FAULT.

A. The case law, including after Babbitt, demonstrates the superseding cause doctrine remains viable in Kentucky.

Appellants have relied heavily on Commonwealth, Transp. Cabinet, Dep't of Highways v. Babbitt, 172 S.W.3d 786, 793 (Ky. 2005), based on dicta in that decision, for the proposition that Kentucky's adoption of comparative fault has diminished the rationale for the doctrine of superseding cause. However, Kentucky cases decided after Babbitt, particularly those where both superseding cause and comparative fault were considered and obviously viewed as consistent doctrines, support the argument that the superseding cause doctrine survives even in the face of comparative fault.

Indeed, in Pile v. City of Brandenburg, 215 S.W.3d 36, 42 (Ky. 2006), also relied on by appellants, the Kentucky Supreme Court cited Babbitt for the proposition that "the rationale for the doctrine of superseding cause has been substantially diminished by the adoption of comparative negligence[.]" Nonetheless, rather than disregarding the superseding cause doctrine, the Court went on to apply it, thus recognizing its continued viability: "It is clear that leaving the key in the vehicle was a negligent act which created the opportunity for the prisoner [Blackwell] to escape with the vehicle and operate it in the

fashion which caused the ultimate fatality. * * * Here, the officer backed out of the driveway and stopped to pick up a tennis shoe belonging to the prisoner. The officer then drove further up the road to check on the van to obtain license information. He then left the motor running with the key in the ignition so as to allow the air conditioning to continue because the temperature was in the mid–70's and to keep the battery from running down. * * * Under all the circumstances, we must conclude that the tortious conduct of Blackwell *was not an intervening or superseding cause* of the fatal accident." Id. (emphasis added).

Notably, Hall v. Moore, 2011 WL 4502641 (Ky. App. Sept. 30, 2011) (unpublished opinion, attached as Exhibit 4), is very similar to the instant case.[1] There, Little overturned his loaded coal truck into a ditch located at the intersection of a mine road and Kentucky Route 122. Moore, an emergency worker who responded to Little's accident, parked his emergency vehicle on the mine road and went to assist with the accident. The plaintiff, Hall, loaded his truck at the mine. While going down the hill, Hall said he saw Moore's truck parked in the middle of the road about 300 or 400 feet from the intersection of the mine road and Rt. 122, but saw no lights on Moore's truck. Moore, however, stated that his emergency lights were on. Hall asserted that, while trying to stop, he lost air pressure in his brakes and could not stop, and that he then hit Moore's truck and proceeded to hit Little's truck. Hall filed suit, alleging he was injured in the accident and that the appellees, Little, Moore and

[1] Ky. R. Civ. P. 76.28(4)(c) provides: "(c) Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." Hall provides the only point of reference following this Court's ruling in Hilen v. Hayes, 673 S.W. 2d 713 (Ky. 1984), which can adequately address the issue before the Court. Hall was, in fact, decided while the instant case was on appeal in the Kentucky Court of Appeals, and, therefore, is clearly a case which adequately addresses the issues (including the viability of comparative fault in a case with strikingly similar facts post-adoption of comparative fault).

Slone (Little's employer), negligently caused his injuries. The trial court granted summary judgment to appellees, stating: "there was significant intervening conduct by the emergency responders, and Plaintiff was comparatively negligent in failing to have his truck under proper control as he approached the intersection with Rt. 122, all of which were the proximate and substantial factors in the Hall collision." Id., *2. In affirming that ruling, the court explained:

> If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the two are not concurrent, and the existence of the condition is not the proximate cause of the injury. Where the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause, and where the circumstances are such that the injurious consequences might have been foreseen as likely to result from the first negligent act or omission, the act of the third person will not excuse the first wrongdoer. When the act of a third person intervenes, which is not a consequence of the first wrongful act or omission, and which could not have been foreseen by the exercise of reasonable diligence, and without which the injurious consequence could not have happened, the first act or omission is not the proximate cause of the injury. The test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, and, if so, the connection is not broken; but if the act of a third person, which is the immediate cause of the injury, is such as in the exercise of reasonable diligence would not be anticipated, and the third person is not under the control of the one guilty of the first act or omission, the connection is broken, and the first act or omission is not the proximate cause of the injury.

Id., *3 (citation and internal quotation omitted).

The court further held that the "trial court was correct in its assessment that Little's accident was not the proximate cause of Hall's accident. While the trial court improperly implied that contributory negligence was a part of the basis for its judgment, we find that the trial court was correct in finding Little's accident was not the proximate cause of Hall's

subsequent accident. Hall's accident was not the natural and probable result * * * of Little's accident. Thus, we will affirm the summary judgment entered in favor of Little and Wanda Slone Trucking." Id., at *4.

The Hall court also held that summary judgment was properly granted as to Moore, the emergency responder, noting the trial court found "there was sufficient sight distance that the Plaintiff had advance warning of the accident scene by way of Mr. Moore's vehicle and had the Plaintiff's brakes, which he admittedly was responsible for maintaining, * * * been in proper working order, he could have avoided the impact." Id. The Hall court affirmed: "Moore states that he did have warning lights on but that, regardless, he was parked far enough away that Hall would have been able to see him in time to stop had he not had brake issues. We agree. While there may be a dispute of whether or not Moore's emergency lights were operating at the time of the accident, it is not a material issue since it was daylight hours and there was sufficient sight distance between Moore's truck and Hall's." Id.

In Hall, then, the appellate court affirmed the trial court's grant of summary judgment to the appellees, which the above-quoted language indicates was based on the rationale that a superseding or intervening cause -- *i.e.,* conduct by emergency responders -- interrupted any possible negligence/causation due to Little's accident. Hall thus further indicates the superseding cause doctrine continues to apply, post-comparative fault adoption, and, significantly, in a case based on very similar facts to those here. See also Peoples Bank of Northern Kentucky, Inc. v. Crowe Horwath, 390 S.W.3d 830, 837 (Ky. App. 2012) ("In the first appeal, this Court addressed whether PBNK could recover its losses arising from Erpenbeck's check conversion scheme. We held it could not and explained: * * * Erpenbeck's check diversion scheme was not a foreseeable consequence of any negligence

by Crowe Chizek. *Rather, Erpenbeck's criminal conduct and PBNK's own negligence in cashing the checks were superseding causes of the injury*") (citations and internal quotation omitted, emphasis added).

In fact, courts in Kentucky have specifically rejected the argument appellants assert here -- *i.e.,* that the superseding cause doctrine is somehow incompatible with comparative fault. For example, in Wilson v. Sentry Ins., 993 F. Supp. 2d 662 (E.D. Ky. 2014), the plaintiff sued the manufacturer of machinery which allegedly caused her hand injury. The court held that, under Kentucky law, the plaintiff's employer's actions, which included requiring a molding machine to be operated with the safety override switch in the "on" position, designing the mold in a way that was not typical, and attempting to alter the operation process while the employee's hands were inside the machine, were a superseding cause of injuries the employee sustained when her hand was trapped and burned in the machine. Notably, in so ruling, the court expressly rejected the notion that Kentucky's adoption of comparative negligence has somehow obviated the superseding cause doctrine: "Even after the adoption of comparative negligence, Kentucky courts have continued to apply the superseding cause analysis to negligence actions." Id. at 665 (citing Pile v. City of Brandenburg, 215 S.W.3d 36, 42 (Ky. 2006) (finding that the doctrine of superseding cause had been "substantially diminished" by comparative negligence, but ultimately holding the tortious conduct of a third person did not qualify as a superseding cause); James v. Meow Media, Inc., 90 F. Supp. 2d 798, 808 (W.D. Ky. 2000), aff'd, 300 F.3d 683 (6th Cir. 2002), cert. denied, 537 U.S. 1159 (2003) (citing Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837–38 (1996) ("The United States Supreme Court has held that the superseding cause doctrine is not inconsistent with the comparative fault doctrine"))).

Indeed, in James, the court stated: "Plaintiffs argue that '[i]f this Court elects to entertain Defendants' assertion of the superseding cause defense, ... the argument must still be denied because it has been abrogated by the pure comparative fault doctrine adopted by the Kentucky Supreme Court.' * * * Plaintiffs state that, [w]hen an original actor's negligence and an intervening actor's negligence both play a role in causing the Plaintiffs' injuries, 'the comparative fault doctrine demands that fault and thus damages be apportioned among the tortfeasors.' * * * Thus, according to Plaintiffs, 'a common law doctrine like superseding cause that forgives the liability of a negligent actor is 'manifestly contradictory' to the purposes of the comparative negligence system." Id. The court noted that the United States Supreme Court has held, however, that, contrary to plaintiffs' argument, the superseding cause doctrine is *not* inconsistent with the comparative fault doctrine. Id. (citing Exxon).

In addition, the James court explained that under the "superseding cause doctrine, the intervening actor becomes solely responsible for injuries whereas under the comparative fault doctrine, fault is apportioned among all tortfeasors. In essence, the superseding cause eliminates the original actor's negligence as a cause of the injuries and absolves him of liability. The district court in Carlotta v. Warner aptly explained, '[t]he doctrine of comparative negligence does not mean that plaintiff is entitled to a recovery in some amount in every situation in which he can show some negligence of the defendant, however slight. If the plaintiff fails to establish that defendant's negligent act or omission was a substantial factor in causing harm to the plaintiff, or if there was a superseding cause, defendant will not be liable in any amount.'" James, 90 F. Supp. 2d at 808-09 (quoting Carlotta v. Warner, 601 F. Supp. 749, 751 (E.D. Ky. 1985)) (further stating: "Despite Plaintiffs' arguments to the

contrary, the superseding cause doctrine is applicable in this matter. Michael Carneal's actions constitute an unforeseeable intervening act which possess all the attributes of a superseding cause"). See also Matilla v. South Kentucky Rural Elec. Co-op. Corp., 2006 WL 485069, *7 (E.D. Ky. Feb. 28, 2006) ("*Having determined the actions of Pittman and Gregory were a superseding cause precluding a finding of liability* against SKRECC, *the Court need not reach determinations on the issues* of trespassing, the National Electric Safety Code, permanent abandonment, *or comparative negligence*") (emphasis added).

Appellants' reliance on Dick's Sporting Goods, Inc. v. Webb, 413 S.W.3d 891 (Ky. 2013), and Shelton v. Ky. Easter Seals Soc'y, 413 S.W.3d 901 (Ky. 2013), for the proposition that "common law tort doctrines like the superseding cause doctrine have limited applicability in modern Kentucky substantive tort jurisprudence," is misplaced. Neither case even addressed, let alone purported to abrogate, the superseding cause doctrine.

In sum, numerous Kentucky courts have, even after Babbitt, continued to recognize the viability of the superseding cause doctrine and/or have referred to and applied that doctrine along with the comparative fault doctrine, thus finding nothing inconsistent about the two doctrines. Indeed, this is consistent with the express holding of the United States Supreme Court, refusing to abrogate the superseding cause doctrine in light of the adoption of comparative fault. See Exxon, 517 U.S. at 837–38.

B. Public policy further supports the continued viability of the superseding cause doctrine.

Appellants single out cases (such as the instant case) involving the doctrine of comparative fault as cases which, they erroneously argue, require new and substantial changes in Kentucky law. Yet, nothing about the doctrine of comparative fault requires abrogation of the superseding cause doctrine.

The doctrine of comparative fault was adopted to do away with the "all or nothing situation" which created a complete bar to recovery by a plaintiff whose own negligence partly contributed to his injury. Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984). In fact, American jurisprudence during the mid-Twentieth Century widely rejected or limited contributory negligence in favor of a comparative fault framework. Id. at 717-18. Kentucky was part of this trend. Id.

Following the adoption of comparative fault, Kentucky Courts, along with a majority of jurisdictions, have confirmed the continuing viability of a number of common-law doctrines which arose under the "former" contributory negligence standard. Sudden emergency and "right to rescue" have each been subject to this critique[2] and their continuing viability has been reaffirmed.

The "doctrine of superseding cause" has also been subject to this critique. As noted, appellants argue that dicta in Comm. Transportation Cabinet v. Babbitt, 172 S.W.3d 786 (Ky. 2005), and Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006), validates abrogation of the doctrine of superseding cause. However, in neither case did this Court purport to abolish the doctrine of superseding causation -- although it certainly could have done so. Rather, as demonstrated above, Kentucky courts have repeatedly held that the common law doctrine of superseding cause adds to—and is not eliminated by—the overall framework of comparative fault. See also Britton v. Wooten, 817 S.W.2d 443, 448-52 (Ky. 1991) (discussing superseding cause doctrine generally); Williams v. Ky. Dept. of Ed., 113 S.W.3d 145, 151 (Ky. 2003) (same).

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[2] See Regenstreif v. Phelps, 142 S.W.3d 1 (Ky. 2004); Waibel v. Sprecher, 824 S.W.2d 887 (Ky. Ct. App. 1992).

With regard to the public policy behind the superseding cause doctrine, Cefalu v. Continental Western Ins. Co., 703 N.W.2d 743 (Wis. App. 2005), rev. denied, 705 N.W.2d 661 (Wis. 2005), cited by Chief Judge Acree in the Court of Appeals opinion below, provides persuasive guidance. There, as here, there were two accidents. The first accident involved a single vehicle – a truck rollover. In the second accident, the plaintiff-appellant was driving her vehicle when she was struck by a third vehicle. Applying the superseding cause doctrine, the trial court ruled that "the rollover accident was not a cause-in-fact of Cefalu's injuries and that public policy considerations militated against imposing liability" on the driver involved in the rollover. Cefalu, 703 N.W.2d at 770. The court of appeals affirmed, and further explained,

> Even were negligence [of the rollover vehicle driver] a cause-in-fact of the [second] accident, we would still refuse to impose liability on [the rollover vehicle driver] on grounds of public policy because Cefalu's injuries were too remote . . . and allowance of recovery would enter into a field that has no sensible or just stopping point. . . .
>
> While it may have been foreseeable that [the first driver's] act of overturning his truck and spilling his load of limestone would have necessitated the assistance of emergency vehicles and personnel, we cannot agree that it was a normal consequence . . . for other drivers to then become involved in an accident [elsewhere].
>
> * * *
>
> If we accept [appellant's] position, then every tortfeasor who causes an initial accident is liable for damages resulting from a second accident even after emergency personnel respond and secure the area. This becomes apparent when we consider the [following] hypotheticals * * * : Would a "rubbernecker" who collides with a vehicle in front of him or her while viewing the original accident have a claim against the tortfeasor who caused the original accident? Would a pedestrian who crosses the street on a "don't walk" sign because he or she is watching emergency personnel and is hit by a car have a claim against the tortfeasor who caused the original accident? As these hypotheticals

> demonstrate, if liability attaches in this case, we would have no clear or obvious guideposts for the cessation of liability. We would inappropriately enter a field that has no just or sensible stopping point.

Cefalu, 703 N.W.2d at 779-82.

The superseding causation and public policy considerations articulated in Cefalu apply with equal force here. If appellants' approach were adopted, there would be no "stopping point" for liability in these situations. As the Cefalu court explained, under appellants' approach every tortfeasor who causes an initial accident would be liable for damages resulting from a second accident--even after emergency personnel respond and secure the area, and no matter how remote the initial accident may have been. Indeed, as discussed below, the public policy considerations underlying the superseding cause doctrine dovetail with the reasons why that issue should be decided as a matter of law by the courts.

II. SUMMARY JUDGMENT WAS PROPER IN THIS MATTER.

Contrary to appellants' contention, the question of superseding cause can and should (when there is not an issue of material fact) be decided on summary judgment. The trial court properly entered summary judgment in favor of appellee Wilma Cornett (thereby concurrently dismissing appellants' claims against Allstate, appellants' underinsured motorist insurance carrier).

Appellants complain that the trial court and the Court of Appeals failed to exercise sufficient caution when using the summary judgment process in this matter. Appellants maintain that for years Kentucky courts have been misapplying the law following Kentucky's 1984 adoption of pure comparative fault. Appellants urge that Kentucky's courts apply caution when considering summary judgment in general and "even more

caution in considering motions for summary judgment premised on common law tort doctrines which predate the adoption of pure comparative fault in Kentucky." (Appellants' Brief at 14.) Appellants' remedy is apparently two standards for determining whether a court is to grant summary judgment: (1) one standard (where less caution can be asserted by the courts) for cases that do not involve common-law tort doctrines which predate the adoption of pure comparative fault in Kentucky, and (2) a separate standard (where more caution must be asserted by the courts) for cases that do involve common-law tort doctrines which predate the adoption of pure comparative fault in Kentucky. To state this proposition is to demonstrate its flaws.

Appellants fail to give the summary judgment process—and the courts applying it—the respect to which they are entitled. The summary judgment process is a valuable asset in Kentucky jurisprudence. This Court has consistently held that when there are no material issues of fact or law, summary judgment (determined by the trial court in which the case is pending) is appropriate. See, e.g., Hoke v. Cullinan, 914 S.W.2d 335, 337 (Ky. 1996); Suter v. Mazyck, 226 S.W3d 837, 840 (Ky. App. 2007).

As with summary judgment, there are numerous questions of law that require the trial court to decide matters that affect the eventual outcome of the case. Such decisions may remove a portion, or indeed all, the decision-making functions from a jury. Questions of law such as evidentiary rulings, issues of privilege and assignment of legal duties, all fall in the capable hands of Kentucky's trial courts for final determination.

The trial court's role in deciding questions of law is one that rests on a firm historical foundation. See, e.g., 1 E. Coke, Institutes 155b (1628) *("Ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores;"* In the same manner

that judges do not answer to questions of fact, so jurors do not answer to questions of law). Thus, this Court should confirm that summary judgment continues its important and necessary role in the adjudication of matters of law.

In Kentucky, "we remain committed to the longstanding tort principle that liability based upon negligence is premised upon the traditional prerequisites, such as proximate cause and foreseeability." Morgan v. Scott, 291 S.W.3d 622, 631 (Ky. 2009). "A party moving for summary judgment in a negligence case is entitled to judgment as a matter of law if the moving party shows that . . . as a matter of law, any breach of a duty owed to the non-moving party was not the proximate cause of the non-moving party's injuries." Bruck v. Thompson, 131 S.W.3d 764, 766 (Ky. App. 2004).

As this Court held in Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980), abrogated on other grounds in Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012), and reaffirmed in Flegles, Inc. v. TruServ Corp., 289 S.W.3d 544 (Ky. 2009), proximate cause "consists of a finding of causation in fact, *i.e.*, substantial cause, and the absence of a public policy rule of law which prohibits the imposition of liability." Deutsch, 597 S.W.2d at 144. Cause-in-fact, or "substantial cause," requires "that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called philosophic sense, which includes every one of the great number of events without which any happening would not have occurred." Id. (citation and internal quotation omitted). See also Flegles, 289 S.W.3d at 553.

Appellants assert that the "sole question" before this Court "is whether a jury could possibly conclude" that the Cornett accident was a "substantial factor" in causing

the appellants' damages. (Appellants' Brief, at 4). However, this assertion fails to recognize that the test for legal causation is a "two part test."

It is a well-established principle that proximate cause presents a question consisting of both law and fact. The "public policy" "side" of the test, in this case "superseding cause," is a question of law that is to be decided by the court. House v. Kellerman, 519 S.W.2d 380, 383 (Ky. 1975). The "substantial factor" "side" of the test is a question of fact, which (when applicable) is presented to a jury, but only after the court has determined (as a matter of law) whether an intervening event constitutes a superseding cause. Miller ex rel. Monticello Baking Co. v. Marymount Med. Ctr., 125 S.W.3d 274, 287 (Ky. 2004).[3] This is to shield a defendant from the potentially limitless scope of actual causation.[4]

As this Court has recognized, the initial action of a defendant "can produce a result similar to that of a snowball rolling down a hill." Deutsch, 597 S.W.2d at 143. Though the end result of the defendant's initial act may far exceed the intention or imagination of the defendant, the link between the initial act and the injury caused remains intact. Id. In this light, to "impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation." Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266 n. 10 (1992) (citations and

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[3] Significantly, the Miller decision was rendered well after Kentucky's adoption of comparative fault and this Court clearly maintained and applied a superseding cause analysis in that case.

[4] See, e.g., "In a philosophical sense the causes of any accident or event go back to the birth of the parties and the discovery of America; but any attempt to impose responsibility upon such a basis would result in infinite liability, and would 'set society on edge and fill the courts with endless litigation.'" Proximate Cause in California, California Law Review, Vol. 38, No. 3, pp. 369-425 (August 1950), citing North v. Johnson, 58 Minn. 242, 59 N.W. 1012 (1894), and "In a philosophical sense, the consequences of an act go forward to eternity, and the cause of an event to back to the dawn of human events, and beyond." CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2642 (2011), citing W. Page Keeton et al., Prosser and Keeton on Torts § 41, 264 (5th ed. 1984).

internal quotations omitted). The question thus becomes how far down the causal chain a negligent person should be held liable for the universe of consequences of their actions.

By establishing reasonable boundaries to assess liability for negligent acts, the doctrine of superseding causation, like many other common law doctrines, complements and enhances the framework of comparative negligence. Superseding causation is, in fact, a crucial and necessary component of this framework, and is to be decided as a matter of law by the Commonwealth's trial courts.

Kentucky's highest Court foresaw the wisdom of the process now in place and reaffirmed in Kentucky:

> Considering the complexity and abstract nature of the various criteria for intervening and superseding causation, exemplified in the Restatement, Torts 2d, §§ 440-453, the disposition of this court to treat the question as a legal rather than a factual issue reflects the inevitable vicissitudes of life. It is enough to tax jurors with the problems of what an "ordinarily prudent person" would have done under similar circumstances, and whether a party's failure to meet that standard was a "substantial factor" in causing the accident, without requiring it to answer such abstruse inquiries as whether the consequences of an intervening force or circumstance "appear after the event to be extraordinary rather than normal," or "highly extraordinary." Cf. Restatement, Torts 2d, §§ 442(b), 447. By its nature, the question must be decided empirically, on a case-by-case basis, and cannot be practically fitted into instructions to juries. The question of whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury.

House, 519 S.W.2d at 382.

Appellants simply cannot avoid this Court's repeated recognition that superseding causation is a legal issue, not a question of fact for the jury to decide. See also Miller, 125 S.W.3d at 287 ("Whether an intervening event is a superseding cause is a legal issue"); City of Florence, Kentucky v. Chipman, 38 S.W.3d 387, 394 (Ky. 2001) ("The

question of whether an undisputed act or circumstance is a superseding cause is a legal issue for the court to resolve and not a factual matter for the jury") (citation omitted).

Nor can appellants avoid the court's clear statement in NKC Hospitals, Inc. v. Anthony, 849 S.W.2d 564 (Ky. App. 1993), that "[s]uperseding causation, as such, is never submitted to the jury, except to the extent that its elements are already incorporated in the comparative fault instructions as simply negligence. Here, the trial court ruled that Dr. Hawkins' negligence was not a superseding cause. Then, the jury found that Dr. Hawkins' negligence was 65% of the cause of Mrs. Anthony's death. Had the jury found 100% of the cause attributable to Dr. Hawkins, in effect, they would have said Dr. Hawkins' negligence was a superseding cause." Id. at 569 (emphasis added).

As Chief Judge Acree noted in his concurrence in the Court of Appeals' decision below (at 14), the above-quoted paragraph from NKC "begins with a principle that remains firmly intact in our jurisprudence – 'Superseding causation ... is never submitted to the jury'; of course not, its determination remains solely the province of the trial judge. Skipping to the end of that sentence momentarily, we see that *first* 'the trial court ruled that Dr. Hawkins' negligence [the undisputed intervening event] was not a superseding cause. *Then*, the jury was given the case. This, too, presents an axiom – the court must determine whether an intervening event was a superseding cause before the jury is given the case." (emphasis in original).[5]

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[5] Chief Judge Acree went on to state that the last sentence ("Had the jury found 100% of the cause attributable to Dr. Hawkins, in effect, they would have said Dr. Hawkins' negligence was a superseding cause") created some confusion because it suggested a jury might make a finding on superseding cause. However, the NKC court merely stated a jury might "in effect" make such a finding, but it is clear the court contemplated that the court, not the jury,

And, in fact, courts often decide superseding causation on motions for summary judgment. Indeed, in Pile, 215 S.W.3d at 38, one of the cases relied upon by appellants, the Court noted that the question of superseding causation was decided on summary judgment. In Hall, 2011 WL 4502641, discussed above, the court affirmed summary judgment on superseding cause grounds, stating: "all parties agree upon the material facts. Hall's truck was out of control and hit Moore's vehicle, which was an emergency vehicle, then hit Little's truck that had overturned and was the accident for which the emergency vehicles were responding. Thus, we believe it was appropriate for the trial court to consider the summary judgment motions." Id., *2. See also Peoples Bank of Northern Kentucky, Inc. v. Crowe Horwath, 390 S.W.3d 830, 833, 837 (Ky. App. 2012) (noting that in its decision in the first appeal the court "held that summary judgment was proper for damages from Erpenbeck's conversion of checks," and that PBNK could not recover losses arising from Erpenbeck's check conversion scheme because "Erpenbeck's criminal conduct and PBNK's own negligence in cashing the checks were superseding causes of the injury") (citations and internal quotation omitted, emphasis added); Bruck v. Thompson, 131 S.W.3d 764, 767-68 (Ky. App. 2004) (affirming summary judgment on superseding cause issue and finding negligent driving of thief who stole truck from truck owner's driveway was a superseding cause of the pedestrian's injuries when the thief struck the pedestrian, where that intervening act was not reasonably foreseeable from the owner's leaving the truck unattended in a private driveway with the keys in the ignition); Wilson v. Sentry Ins., 993 F. Supp. 2d 662, 665 (E.D. Ky. 2014) ("Defendant's Motion for Summary Judgment as to the claims for manufacturing defect and defective

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would decide the question of superseding causation. Otherwise, the court would not have emphasized that superseding causation is "never" submitted to the jury.

design must be granted. Even assuming Defendant was negligent in the manufacture or design of the machine, the conduct of Molding Solutions, Plaintiff's employer, acts as a superseding cause of Plaintiff's injuries"); Matilla v. South Kentucky Rural Elec. Co-op. Corp., 2006 WL 485069, *6 (E.D. Ky. Feb. 28, 2006) (affirming summary judgment on superseding causation grounds, noting: "* * * Kentucky courts re-insert considerations of foreseeability into a determination of superseding cause. And although proximate causation is a question for the jury, the determination of whether a superseding cause relieves a defendant of liability is 'never submitted to the jury' and must be determined by the Court") (quoting NKC Hospitals).

The doctrine of superseding cause, therefore, has neither been—nor should it be—abrogated or modified by the adoption of comparative fault principles in Kentucky. Rather it continues as a necessary part of the entire framework necessary for the determination of legal liability, and can and should be resolved on summary judgment in cases such as this.

III. THERE ARE NO UNRESOLVED MATERIAL ISSUES.

In analyzing appellants' arguments in response to Defendant Cornett's motion for summary judgment below, and in doing so while viewing the evidence in the light most favorable to the appellants, the trial court and Court of Appeals found the material facts to be that: 1) the Cornett accident occurred and, thereafter, 2) the appellants were injured "in a second accident when they were stopped 1.3 miles back in the delayed traffic and were rear ended by a tractor trailer." Opinion and Order entered 3/23/10, p. 1. There is no genuine issue, contest or controversy over these material facts.

Appellants have argued extensively, however, that the interval of time between the one-car Cornett accident and the tractor-trailer striking the Cadles' vehicle is an issue in

this case. Appellants' argument fails, however, because the "time" between the accidents is not material.

A genuine fact issue must entail an unresolved dispute which the trier of fact could resolve to support a verdict in appellants' favor. Welch v. American Pub. Co., 3 S.W.3d 724, 729 (Ky. 1999). Assuming, however, for the sake of this analysis, that the time interval between accidents is what appellants say it is, even the most favorable characterization of that interval could not reasonably result in a verdict in appellants' favor.

It is an undisputed and material fact that the accidents happened over one mile apart. If the time interval were also a relevant, material factor, it must be within the chain of causation. In this case, that would mean the time between the accidents must neither be too short, nor too long, to be a relevant factor in causation. For example, if the two accidents happened precisely simultaneously (but over one mile apart), one could not logically be the cause of the other. As the time interval increases from zero, the shorter the time interval the less relevant time remains. For example, at one-second, ten-second, and thirty-second, intervals—and at one mile apart—one event could still not be the cause of the other.

In short, time is not material to the summary judgment analysis in this case. Instead, what is material is the fact that a mile long line of vehicles successfully stopped safely (one after another) following the Cornett accident—and before the Cadle accident. The trial court was correct in finding, as a matter of law, that the Cornett accident, over one-mile distant from the Cadle accident, was not a proximate cause thereof.

In Kentucky Traction & Terminal Co. v. Roman's Guardian, 23 S.W.2d 272 (Ky. 1929), the court defined proximate cause in holding that "[t]he proximate cause of any injury

is that which, in a natural and continuous sequence, *unbroken by any independent responsible cause*, produces the injury, and without which it would not have occurred." Id. at 273 (emphasis added). The trial court correctly applied this definition of proximate cause in holding that the Cornett accident was not part of a "chain reaction" but rather that the Cornett negligence "spent itself," as over a mile long line of vehicles each safely stopped without damaging, injuring or otherwise even contacting the vehicles in front of and behind them.

The court below found essentially that just because one action preceded a subsequent but distant action does not mean the first action is the cause of the second. In holding that the two accidents at issue here were not part of a "chain reaction," the trial court found that the Cornett accident was not "unbroken by any independent responsible cause," and therefore was not the proximate cause of appellants' injuries. Also, in holding that the negligence which led to the first accident had "spent itself," the trial court found that, even without including the actions of the first responders and the negligence of the truck driver whose vehicle rear-ended Plaintiffs' vehicle, the effects of Ms. Cornett's initial negligence were concluded before the Cadle accident occurred.

As the trial court noted, Donegan v. Denney, 457 S.W.2d 953 (Ky. App. 1970), is a compellingly similar case factually. It is still valid precedent and its holdings are relevant and directly applicable to this case. In Donegan, a soda truck dropped some merchandise in the roadway. This obstruction caused traffic to back up. Several subsequent accidents involving multiple vehicles then occurred some 800 to 1000 feet behind the scene of the spill. The court held that the trial court correctly found the truck owner's misconduct was too

remote and superseded by too many intervening factors to afford a basis for liability against the truck owner for the multiple vehicle collision. Id. at 957-58.

Appellants here argue first that the establishment of comparative fault in Kentucky negates the holdings of Donegan. The Donegan Court, however, considered the question of proportionate fault in relation to other claims in the case, yet still held that the soda company's negligence had "spent itself" and that the negligence of the other driver constituted a superseding cause. Donegan remains valid precedent in Kentucky precisely because not every claim against every actor within a given chain of events—even a negligent actor—must be presented to the jury. Appellants would have this Court overrule Donegan, but there is no cause to do so.

Indeed, as noted above, the court recently addressed the issue of proximate cause in a factually similar case, Hall v. Moore, 2011 WL 4502641 (Ky. App. Sept. 30, 2011) (unpublished). The Hall court granted summary judgment to the emergency responder, whose vehicle the plaintiff struck, in part because "there was sufficient sight distance between Moore's truck and Hall's" such that Hall had time to brake. Id., *4. The court's discussion regarding intervening causation indicates the court viewed the sight distance and the plaintiff's failure to brake as a superseding cause.

Kellner v. Budget Car and Truck Rental, Inc., 359 F.3d 399 (6th Cir. 2004) (applying Tennessee law), is also instructive, particularly since the court granted summary judgment on the issue there even though Tennessee, unlike Kentucky, has a preference for these types of cases to go to the jury. There, Zaffer was driving his tractor-trailer westbound on Interstate 40 in Tennessee, and moved the rig into an emergency lane when it became disabled. According to record testimony, the tractor-trailer could be seen by approaching westbound

motorists from a distance of at least 1,000 feet. Id. at 402. Zaffer was under or near the tractor-trailer when Rupe was driving westbound on I-40 in a Ford truck with a 24-foot cargo box, rented from Budget. Behind the Ford truck, Rupe towed a minivan. In the passenger cab, along with Rupe, were her grandsons. The Budget truck driven by Rupe left the far right travel lane of traffic, moved into the emergency lane, and collided with Zaffer's parked tractor-trailer. As a result of the collision, Rupe, Zaffer and one of the grandsons were killed, while the other grandson sustained injuries requiring hospitalization. The parents of the grandsons filed a negligence suit against various defendants, including MDTS and CHTL (companies for whom Zaffer hauled freight) and Zaffer's estate. The trial court granted summary judgment to the defendants holding that, as a matter of law, the defendants' actions were not the proximate cause of the appellants' injuries and damages.

The court explained: "Based upon the undisputed facts that Zaffer's rig rested completely off the active traffic lanes of the interstate and was plainly visible for a distance of over 1,000 feet, the district court reasoned that 'a reasonable jury would have to conclude Rupe could see the rig prior to the accident.' Consequently, the court concluded that Rupe's actions in leaving the travel lanes and crashing into Zaffer's rig were the proximate cause of plaintiffs' losses." Id. at 403. The court further explained that while the "general rule in Tennessee [unlike in Kentucky, is] that the foreseeability of an intervening, superseding act presents a jury question," Tennessee has "adopted a special rule in standing vehicle cases, which the district court applied in the present case, noting that '[u]nder this rule it is unforeseeable as a matter of law someone would drive into a plainly visible standing vehicle,' and that "'[t]he operator of a vehicle that crashes into a vehicle negligently left standing in an unsuitable stopping place provides the proximate cause of any resulting

injuries if she could see the standing vehicle in time to avoid a collision.'" Id. at 403-04 (citations omitted).

The Sixth Circuit, discussing the superseding cause doctrine, stated:

> Tennessee precedent construes foreseeability more narrowly than plaintiffs suggest. In Underwood v. Waterslides of Mid-America, 823 S.W.2d 171, 180 (Tenn. Ct. App. 1991) [*abrogated on other grounds in* Chapman v. Bearfield, 207 S.W.3d 736 (Tenn. 2006)], the court discussed foreseeability in the context of a superseding, intervening cause:
>
> > The essence of the rule as to independent intervening cause is whether the subsequent successive acts and injuries were probable and therefore to be anticipated.... Our Supreme Court has explained that the test of liability under the law of intervening cause requires a person to anticipate or foresee what would normally happen; one is not required to anticipate and provide against what is unusual or unlikely to happen, or that which is only remotely possible.

Kellner, 359 F.3d at 407 (quoting Underwood). Notably, the Kellner Court held that, "[p]ursuant to this standard, the district court correctly determined it was not foreseeable, within the meaning of Tennessee law, that Rupe, with an extended unobstructed view of Zaffer's tractor-trailer, would leave three travel lanes of interstate and strike the rig that was parked completely within the emergency breakdown lane." Id. The Court thus recognized that distance can and should be a dispositive factor in the superseding cause analysis.

In Obray v. Glick, 104 Idaho 432, 660 P.2d 44 (1982), the plaintiffs sued the city, a city police officer, and others to recover for injuries sustained when the plaintiff was struck by an automobile while attending a disabled vehicle on a roadway. The trial court entered summary judgment in favor of the city and the police officer, and the Idaho Supreme Court affirmed. The Court held that the plaintiff's act—walking into a lane of traffic without looking for oncoming automobiles and spending 10 to 20 seconds to upright a traffic reflector—combined with a third-party motorist's act—driving on an unobstructed roadway

and failing to see the plaintiff standing in the roadway—constituted an intervening superseding cause of the ensuing accident relieving the defendant police officer of any liability for instructing the plaintiff to keep the reflector upright until a tow-truck arrived for the plaintiff's truck. Id. at 433-34, 660 P.2d at 45-46. Here too, a third-party motorist's act -- *i.e.*, the truck driver's failure to stop for the traffic jam for which the Cadles themselves were able to stop -- was a superseding cause.

Beitler v. City of Philadelphia, 738 A.2d 37 (Pa. Cmwlth. 1999), app. denied, 749 A.2d 472 (Pa. 2000), is also instructive. Beitler sued the City and other defendants after she was injured when the car she was driving struck a City police car that was stopped in the left lane on the westbound side of the Schuylkill Expressway. Officer Dill had stopped his car there and left it with its motor running and its roof lights activated while he went over the median to assist Roldan, whose car had broken down and was stopped in the left lane of the eastbound side of the expressway. Id. at 40. Beitler appealed the trial court's order dismissing the complaint as to Roldan on the ground that any negligence on his part was too remotely connected to constitute legal proximate cause for Beitler's injuries. Roldan argued the conduct of Officer Dill constituted a superseding cause, because one could not reasonably be expected to foresee that Dill would stop a police vehicle in the roadway on the other side of the highway in order to assist Roldan, rendering the officer's conduct highly extraordinary. The Court agreed and affirmed the trial court's ruling on this point. Id. Here, the Cadles' accident was even more remote, and the conduct of the driver that hit them even less foreseeable -- particularly since the Cadles themselves were able to stop for the 1.34 mile traffic jam.

Indeed, it is clear that the Cornett accident did nothing more than create a condition where the Cadles' accident became possible. Cornett's negligence—as it related to the Cadles' vehicle, which stopped in a long line of other successfully stopped vehicles over one

mile away from Cornett's vehicle—simply did not connect Cornett to the subsequent independent negligence of the truck driver who failed to keep a lookout on a clear day, failed to avoid the collision on a straight stretch of highway and failed to apply his brakes to prevent striking the Cadles' vehicle at 60 miles per hour.

Based upon these findings, as it was required to do as a matter of law the trial court held that "the act of the first responders in stopping traffic, and the negligence of the semi-driver constitute superseding causes." Either of these superseding causes were sufficient to eliminate any liability on the part of Cornett.

Moreover, as in Kellner, just as the distance between Rupe's vehicle and Zaffer's tractor-trailer, which provided Rupe with an "extended unobstructed view" of Zaffer's rig, demonstrated Rupe's hitting Zaffer's vehicle was a superseding cause of the accident, the 1.34 mile-long traffic jam separating Cornett's vehicle and the site of the Cadles' accident is also dispositive. As the Court of Appeals here recognized (at 10): "The Cadles themselves were able to effectively stop at the tail end of that [1.34 mile-long] traffic jam," and "there is nothing in the record explaining why [the tractor trailer driver] failed to brake in time, much less that any condition attributable to the traffic jam prevented him from doing so."

Contrary to appellants' contention, Donegan is not factually distinguishable. There, the court considered whether one of two collisions on an expressway, involving five cars and occurring some 800 to 1000 feet distant from the point of the collisions directly attributable to the defendant stopping its truck on the highway, was also the natural and probable result of the defendant stopping its truck on the highway. The Donegan Court stated that "'hindsight,' or an after-the-event scrutiny, must be resorted to in deciding whether the act of a third person or other force is legally a superseding cause." 457 S.W.2d at 958. The Court

observed there were "so many instances in which motorists had safely stopped between the site of [the defendant truck driver's] negligence and the locale of the five-car collision at bar" that "it would appear abnormal to suppose that [the defendant truck driver's] original negligence was not superseded." Id. Here, as in Donegan, the Cadles produced evidence of only one accident -- their own -- that occurred within the approximately 1.34 mile-long traffic jam.

CONCLUSION

The trial court was correct that there is no genuine issue of material fact; that the Cornett accident was not a proximate cause of appellants' accident; and that the negligence of the tractor-trailer driver interposed itself as the superseding and sole cause of appellants' injuries. The summary judgment granted by the trial court to appellee Cornett was applicable also to appellants' claims against appellee Allstate, appellants' UIM insurer, and therefore dismissal of appellants' claims against Allstate was proper and should be AFFIRMED.

Respectfully submitted,

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